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No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH and RICHARD CHENEY,

Petitioners,

v.

ALBERT GORE, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF THE FLORIDA HOUSE OF REPRESENTATIVES AND FLORIDA SENATE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY AND SEEKING REVERSAL

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court erred in establishing new standards for resolving presidential election contests that conflict with legislative enactments and thereby violate Article II, Section 1, Clause 2 of the United States Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

2. Whether the Florida Supreme Court erred in establishing post-election judicially created standards that threaten to overturn the certified results of the election for President in the State of Florida and that fail to comply with the requirements of 3 U.S.C. § 5, which gives conclusive effect to state court determinations only if those determinations are made "pursuant to" "laws enacted prior to" election day.

3. Whether the use of arbitrary, standardless and selective manual recounts to determine the results of a presidential election, including post-election judicially created selective and capricious recount procedures, that vary both across counties and within counties in the State of Florida violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

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INTEREST OF THE *AMICI CURIAE*[1]

The Florida Legislature[2] is, as this Court recognized in its prior opinion related to this matter, the entity that has plenary power over — and ultimate responsibility for — directing the manner in which Electors are appointed to represent Florida in the Electoral College. This case implicates the Florida Legislature's vital interest in having this election conducted in a manner that is orderly, fair, constitutional, and in conformity with the Legislature's directions. More, it implicates the constitutional duty of the Florida Legislature to assure that Florida "shall" be represented in the Electoral College and have its electoral votes deemed binding when counted by Congress. U.S. CONST. ART. II, § 1, ¶ 2; 3 U.S.C. § 5.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article II of the U.S. Constitution assigns State Legislatures the responsibility for directing the manner for appointing Presidential electors. The Florida Legislature has discharged that responsibility by enacting a detailed code for the selection of Florida's electors. As we explain in detail

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1. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The Florida Legislature has secured the consent of all parties to the filing of a brief as *amicus curiae* and those consents are being lodged with the Clerk of the Court.

2. We use the term "Florida Legislature" to refer to both the Florida Senate and the Florida House of Representatives.

in this brief, the Florida Supreme Court's decision not only changes, but engages in wholesale re-writing, of the Legislature's directions. At the heart of its decision is the Florida Supreme Court's premise that an interpretive manual count is more accurate than a mechanical count and outweighs any need for finality and meeting deadlines — both of which are contrary to the Legislature's premise. If the decision below is allowed to stand, the Electors will have been chosen not "in such Manner as the Legislature . . . may direct," U.S. CONST. ART. II, § 1, but in a manner newly conceived and promulgated for this occasion by four justices of the Florida Supreme Court.

This anomalous ruling not only displaces the authority of the Florida Legislature but places at risk the participation of the Florida voters in the election of the next President because Congress plainly may deem it a change of law that makes the safe harbor of 3 U.S.C. § 5 unavailable. Even without that risk, the manual recount decreed by the court below cannot possibly be finally determined by the deadline of midnight December 11 set out in 3 U.S.C. § 5. Whether or not the chaotic, inconsistent, and standardless manual recounts required by the court's order could be completed by the deadline, the ensuing legal challenges certainly could not. Nor, as Chief Justice Wells' dissent pointed out, would such a dubious and poorly monitored process secure a more accurate determination of the will of the people. Indeed, the very irregularity of such a process might itself lead the Congress of the United States to question whether the votes of such Electors have been so "regularly given," 3 U.S.C. § 15, and thus may put those votes in question even if contests could have been resolved in a timely manner.

The decision below also disregards the mandate of this Court delivered only one week ago in *Bush v. Palm Beach County Canvassing Board*, No. 00-836 (Dec. 4, 2000), vacating the Florida Supreme Court's earlier decision and judgment in that case. One example of that disregard is the remarkable and unjustified order requiring the inclusion of several hundred votes in Palm Beach and Miami-Dade counties added in a manual recount that had proceeded past the Secretary's statutorily mandated deadline of November 14. In giving this order, the court below gave effect to a judgment and decree that this Court had vacated. Nor is it even plausible to argue, as the Florida court did, that these votes were being added because after all they had been counted by the county canvassers during that first questionably extended recount period. That recount, which had taken place during an extension which this Court had vacated and therefore nullified, was conducted under the rules governing *protests* and not the more stringent rules governing *contests*. Election protests, under which those votes were added, are conducted by the canvassing boards alone. But the procedures which the court below was supposed to be adjudicating were election contests, which are carried out by a judge, after hearing evidence and argument in open court. Those hundreds of votes added by the order of the court had never been subjected to such testing.

Finally, the decision below puts the State of Florida in violation of the United States Constitution, posing yet another risk to Florida's representation in the Electoral College. The right to vote and the right to have one's vote given equal effect are fundamental rights. A State may not design its system for selecting presidential Electors in a way that burdens or distributes that right unequally. The scheme the court below has put in place for counting the votes for

President is so replete with arbitrary and unjustifiable distinctions that it violates Equal Protection. Any designation of electors in this way might thus subsequently be either constitutionally invalidated by the courts or rejected by Congress when it counts the electoral votes.

In our brief as *amici curiae* in *Bush*, *supra*, the Florida Legislature argued that this Court should decide that the ultimate forum for resolving the disputes arising out of this extremely close and troubled election is in the political branches — the Florida Legislature and U.S. Congress — whose members will have to pay a swift and certain political price for an unfair and unwise decision. So that suggestion not be misunderstood, we also stated (and reiterate today) that the Florida Legislature will faithfully comply with this Court's resolution of these problems and with any decision it makes about which entity has authority to redress them. But whether this Court decides that the ultimate forum for correction lies in this Court or in the political branches, the decision of the Florida Supreme Court must be corrected as quickly as possible.

ARGUMENT

I. THE FLORIDA SUPREME COURT HAS DISTORTED AND DISREGARDED THE LEGISLATIVE SCHEME FOR PRESIDENTIAL ELECTIONS IN VIOLATION OF ARTICLE II.

A Presidential elector can constitutionally be appointed only "in such Manner as the [State] Legislature thereof may direct." U.S. CONST. ART. II, § 1, ¶ 2. If an elector is appointed in some manner other than that directed by the State Legislature, that appointment is unconstitutional.

This constitutional clause confers "plenary power to the state legislatures in the matter of the appointment of electors." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). Indeed, as this Court recognized, in "the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under ART. II, § 1, cl. 2, of the United States Constitution." *Bush, supra*, Op. at 4. Thus, this direct grant of authority " 'operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power.' " *Bush*, *supra*, at 5 (quoting *McPherson*, 146 U.S. at 25).

State courts may not invoke even the state constitution to circumscribe this state legislative power. *Bush*, *supra*, at 5, 7.[3] But to say this is not at all to authorize state courts to circumscribe the legislative power based on *non*-constitutional judicial views about the best manner of choosing electors. To the contrary, state courts have even less grounds to deviate from the state legislature's directions when they do not even have a purported basis in the state constitution. Indeed, of all the possibilities that the Founders considered when they decided to whom to give the power to appoint Presidential electors, the one possibility that was universally rejected by the Founders was to allow the manner

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3. *See McPherson*, 146 U.S. at 34-35 ("This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions . . . . Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.") ((quoting favorably Senate Rep. No. 395, 1st Sess., 43d Cong. (1874)).

of such appointments to be controlled by state courts. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 110 (Max Farrand ed. 1966) (James Madison: "The State Judiciarys had not & he presumed wd. not be proposed as a proper source of appointment" of the Presidential electors).

A. The Legislative Directions on the Manner of Conducting Elections.

Before this election, the Florida Legislature provided a detailed and orderly scheme for the resolution of election protests and contests. Under those legislative directions, all machine ballots must be counted by machines that use a uniform standard. Manual recounts are permitted only in limited cases involving defective machines or ballots, are subject to strict limitations on how they may be conducted, and when legally denied cannot be required by merely bringing a contest action.

1. *Manual Recounts Are Rarely Permitted.*

The legislative directions provide that manual recounts are permitted only if particular ballots were damaged or defective, or if a particular county's machines were defective in a way that made them tally votes incorrectly, and even then only if those defects could not otherwise be corrected. *See* FLA. STAT. § 101.5614(5); FLA. STAT. § 102.166(5). The Legislature nowhere authorized wholesale manual recounts based on the dubious empirical premise that manual recounts can "interpret" ballots more accurately than well-functioning machines. To the contrary, permitting manual recounts on that basis is contrary to:

(a) The statutory text, which allows manual recounts only for otherwise uncorrectable "error in vote tabulation,"

FLA. STAT. § 102.166(5), not for a claim that even well-functioning machines err in "ballot interpretation." Not only does the term "tabulation" indicate a merely ministerial tally, but the term "vote tabulation" indicates that the tally was meant to tabulate already recognized votes, not to determine whether the ballot rendered a vote at all. Likewise, FLA. STAT. § 102.166(5)(a) & (b) clearly indicate that the Legislature thought the type of problem justifying a manual recount would normally be correctable by fixing the machines or software. These provisions would not make sense if the Legislature thought the problem justifying correction was that even well-functioning machines count less well than humans.

(b) The statutory structure, which allows manual recounts only on a county-specific basis. *See* FLA. STAT. § 102.166. The county-specific nature of the manual recount would not make any sense if the gravamen of the complaint were that even well-functioning machines miscount votes, since that complaint applies statewide. But this county-specific legislative direction does make sense if manual recount authorization is limited to errors in counting made by a particular county's machines. Similarly, the fact that the statute requires a manual recount of "all ballots" in the county, FLA. STAT. § 102.166(5)(c), makes sense if the gravamen of the complaint is a problem with the ability of that county's machines to count any ballot, rather than an interpretive problem limited to so-called "undervotes."

(c) The statutory deadline, which requires that manual recounts be finished within seven days of the election. *See* FLA. STAT. § 102.166; FLA. STAT. §§ 102.111-112. This legislatively imposed deadline makes perfect sense if the statute is limited to correcting defective machine counting.

Such problems arise seldom, and normally can be corrected by fixing the machines or software. Moreover, even when a manual recount is required, a ministerial manual recount (as opposed to an elaborate "interpretive" manual recount) can easily be done within a seven-day period by hiring additional counting teams. Indeed, the Florida Legislature has expressly directed that, to meet the deadline: "The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots." *See* FLA. STAT. § 102.166(7)(a). Because the manual recount is meant to be ministerial rather than interpretive, adding counting teams in larger counties avoids the bottleneck problem that results when interpretive decisions must be made by a three-person canvassing board for each county.

(d) The statutory purpose, which the face of the statute plainly indicates is to use manual recounts only as a last resort. If manual recounts could be justified on the ground that they were more accurate than machine recounts at interpreting ballots, then it would follow that manual recounts should always be done in **every** close election. But this would make a manual recount the first resort rather than the last. Further, it would be inconsistent with the fact that the Legislature specified that the statutory remedy for a close election was a machine recount, not a manual recount. *See* FLA. STAT. § 102.141(4). The Florida Legislature, in determining the manner of conducting Presidential elections, was surely free to adopt the premise that interpretations by well-functioning machines (while not perfect) are more accurate than "interpretive" manual recounts, which are susceptible to problems of fatigue, human error, unintended ballot alteration, inconsistency across counters and counties, conscious or unconscious bias, and fraud or other mischief.

(e) The opinion of the Secretary of State, whom the Legislature directed would (rather than the courts) be in charge of issuing binding opinions interpreting these provisions for county boards, and assuring uniformity among them.[4] She opined that manual recounts were not available when voter error produced partially perforated or indented chads that were not registered as votes by non-defective machines.

(f) Prior practice before this election, which was not to do a manual recount because of a claim that a county's machines were failing to count partially perforated or indented chads. *See* Transcript of Oral Arg. in *Bush*, *supra*, at 39-40 (concession of Florida Attorney General that no county had previously done so). For example, in *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992), the board recognized that "voter errors in the piercing of computer ballot cards created loose or hanging paper chads." But the board declined to do a manual recount even though two machine counts indicated a margin of 3-5 votes. "Such voter errors, the board explained, are caused by hesitant piercing, no piercing, or intentional or unintentional multiple piercing of computer ballot cards, creating what are referred to as overvotes and undervotes. The board *thereupon* denied appellee's request for a recount." *Id.* (emphasis added). Thus, before this election, the fact that

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4. FLA. STAT. § 106.23(2) ("The Division of Elections shall provide advisory opinions when requested . . . . The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought"); FLA. STAT. § 97.012 ("The Secretary of State is the chief election officer of the state, and it is his or her responsibility to: (1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

a request for a manual recount was based on incompletely perforated chads was considered not just insufficient, but an affirmative reason to reject a manual recount because the request was based on voter error rather than on machine or ballot defects.

2. *Manual Recounts Must Meet Strict Conditions.*

To the extent manual recounts are permitted under this statutory scheme, their conduct is subject to five conditions:

(a) The manual recount must include all ballots affected by the relevant defect. If a manual recount is done, the Legislature directed that it must count "all ballots" in the county having machine problems, FLA. STAT. § 102.166(5)(c), or if the problem is defective or damaged ballots, then "all such ballots" must be manually recounted, FLA. STAT. § 101.5614(5). Partial manual recounts were nowhere authorized by the Legislature.

(b) Any manual recount cannot count dimpled or pregnant chads. If a manual recount is done, it should not count a ballot as a vote unless the ballot left a "clear indication of the intent of the voter as determined by the canvassing board." FLA. STAT. § 101.5614(5). *See also* FLA. STAT. § 102.166(7)(b). This was previously determined by the only canvassing board to address the issue before this election, Palm Beach County, as meaning that chads could only be counted as votes if at least two corners were detatched, and not if the chad was merely dimpled or pregnant. *See* Petitioner Exh. J. Prior to this election, no Florida county board had ever counted a dimpled or pregnant ballot as a vote.

(c) Any manual recount must be completed in accord with standards for counting chads that are uniform across the counties. The Legislature has directed: "The Department of State shall adopt rules prescribing standards for ballots used in electronic or electromechanical voting systems. Such standards shall ensure that *ballots are counted in a uniform and consistent manner* and shall include, without limitation, standards for the . . . Scoring of ballots." FLA STAT. § 101.5609(8) (emphasis added). *See also* FLA. STAT. § 97.012 (the Secretary of State shall "Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

(d) The results of any manual recount completed more than seven days after the election are not legal votes. The Legislature directed that any votes added by manual recounts after the seven-day deadline are not considered legal votes that must be counted, but to the contrary are votes that "shall be ignored." FLA. STAT. § 102.111.[5]

(e) County boards have discretion not to do manual recounts. See FLA. STAT. § 102.166(4)(c) ("The county canvassing board may authorize a manual recount."); *Hogan*, 607 So. 2d at 510 ("The statutes clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board.") A county thus need not proceed if it cannot complete a manual recount of all the ballots under the correct standards by the statutory deadline.

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5. Pursuant to a consent decree with the federal government, Florida law also allows for the later receipt of military and other overseas ballots.

3. *Contest Procedures Do Not Expand the Limits on Manual Recounts.*

The Legislature also authorized a contest procedure. But the legislative directions on the manner of conducting contests nowhere suggest that the contest procedure was intended to overturn the statutory scheme and create an automatic right to manual recounts in every close election. That would have been inconsistent with the statutory preference for machine recounts. Nor would there have been any reason to make the contest right to manual recounts broader than the protest right to manual recounts. That would saddle courts with manual recounts that county boards could have done, and would put courts in the odd position of ruling that it was illegal for the county boards or elections commission to deny manual recounts even though other statutes authorized or required the board or commission to do so.

To the contrary, what the contest statute provides, in the key section stressed by the Florida Supreme Court, is that one ground for a contest is: "Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." FLA. STAT. § 102.168(3)(c). If a well-functioning machine interprets a ballot as not having made a vote, then that is the rejection (or counting) of a legal *non-vote*, not the rejection of a legal vote, for legally the ballot has not registered a vote in the manner directed by the Legislature. *See supra.* Likewise, if a county properly exercises its discretion not to do a manual recount, then any ballot that is counted as a non-vote by a machine is the rejection (or counting) of a legal non-vote, not the illegal rejection of a legal vote. Thus, Florida law before this election did not interpret the right of

a contest to allow a manual recount in a contest when a manual recount had been rejected by the county. *Hogan*, 607 So. 2d at 510 ("Although section 102.168 grants the right of contest, it does not change the discretionary aspect of the review procedures outlined in section 102.166.") Finally, if votes are rejected because they were produced by a manual recount that came in after the statutory deadline, FLA. STAT. § 102.111, then they are rejected legally, not illegally, and thus do not represent the rejection of legal votes.

In short, rejecting ballots that the county boards or election commission legally deemed non-votes according to the statutory directions of the Legislature cannot constitute the improper "rejection of . . . legal votes" under the contest statute. To say otherwise would mean that the Legislature was requiring or authorizing county boards and election commissions to make a decision not to count certain votes that the Legislature later would want overturned by courts in a contest action. Such a reading would be completely nonsensical — the Legislature cannot have meant to require or authorize election agencies to act in a way the Legislature thought courts should deem illegal.

Consistent with this, the interpretation of Florida's contest statute before this election has always required that the plaintiff prove "substantial noncompliance with the election statutes" as well as a "reasonable doubt" as to whether the illegal noncompliance affected the outcome. *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720, 725 (Fla. 1998). For example, in rejecting a contest action seeking a manual recount because of partially perforated chads, the court held: "All that should have been considered by the lower court was whether appellant failed

to perform some mandatory statutory act or whether there were any electoral improprieties which had, not possibly might have, an influence on the ultimate choice of the voters." *Hogan*, 607 So. 2d at 510.

The 1999 amendments to the contest statute were not intended to change the requirement of proving some substantial illegality by election officials since the plain language required an illegal "rejection of legal votes." FLA. STAT. § 102.168(3)(c). Indeed, the legislative history made plain that the Legislature was only trying to codify existing law, not alter it. The Final Legislative Analysis stated that the 1999 "bill *codifies* the grounds for contesting an election" by, among other things, adding the language of § 102.168(3)(c). *See* Fla. H.R. Comm. on Election Reform, HB 281 (1999), Final Analysis (July 15, 1999), at 6, 7 (emphasis added). There is thus absolutely no reason in either the text or legislative history to think the 1999 amendments dropped the substantial noncompliance requirement that has long been necessary to bring a contest under Florida law.

B. The Florida Supreme Court Has Engaged in Wholesale Deviations from the Legislative Directions.

The Florida Supreme Court has engaged in a wholesale re-writing of the legislative directions regarding the manner in which elections shall be conducted. Most of the re-writing is based on the Florida Supreme Court's empirical premise — contrary to legislative directions — that "interpretive" manual recounts more accurately reflect the "will of the voters" than counts by well-functioning machines, and that the Legislature could thus never have meant to deny any vote interpreted to exist by such a manual recount. *See Palm Beach County Canvassing Board v. Harris*,

2000 WL 1725434, at *4, 12-13 (Fla.); *Gore v. Harris*, 2000 WL 1801246, at *8-9, 11-12. This empirical premise about accuracy is dubious. Although machine counts doubtless have their inaccuracies, they distribute any error randomly across candidates, and there is no reason to think they are as likely to affect the outcome as the potentially biased errors made in manual counts, especially when the latter are made using shifting or vague standards. In any event, whether empirically accurate or not, the Florida Supreme Court was not entitled to use an empirical premise contrary to that of the Legislature in order to deviate from the legislative directions on the manner in which elections shall be conducted.

But that is precisely what the Florida Supreme Court did here. Because it adopted the contrary premise, it presumed that manual recounts must be allowed in cases where there was no claim that the machines or ballots were defective, but only the claim that manual recounts could interpret ballots more accurately than machine counts. By creating this newfound right to interpretive manual recounts, the Florida Supreme Court also created a "conflict" that otherwise would not have existed between the manual recount provisions and the seven-day statutory deadline, a purported conflict then used to justify the conclusion that the legislative deadline was ambiguous. *Palm Beach*, *supra*, at *7-8.[6]

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6. The Florida Supreme Court also cited a supposed statutory conflict between the "shall" and "may" provisions of FLA. STAT. §§ 102.111-112. *Palm Beach*, 2000 WL 1725434, at *9-10. Relying on the fact that § 102.112 was originally enacted later, the court resolved this conflict in favor of the "may" provision. But the court ignored the fact that both statutory provisions have been repealed (Cont'd)

Further, the Florida Supreme Court's decision to ignore all the Florida Legislature's statutory deadlines for manual recounts directly resulted from a combination of the court's unwarranted empirical assumption about the enhanced accuracy of interpretive manual recounts and its mistaken policy assumption that more accurate counts must trump any

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(Cont'd)
and re-enacted every other year. *See, e.g.*, Florida Statutes 11.2421, 11.2422 (1999). In each re-enactment, then, the Legislature must have thought the two provisions were consistent. They accordingly should be read to give meaning to both rather than to allow one to repeal the other. The court also ignored the fact that the legislative history of the original adoption of § 102.112 shows a clear intent to retain the deadline and mandatory wording of § 102.111. Although the Senate had proposed amending § 102.111 to extend the deadline from seven to thirteen days and to change the "shall" to a "may", *see* 1989 Senate Journal, p. 819, the House rejected both amendments, *see* 1989 House Journal, p. 1320, and then the Senate agreed to the House version. Chapter 89-338, § 30 at 2162, Laws of Florida. The intent of the Legislature in enacting § 102.112 was thus not to extend deadlines or create discretion to do so. It was rather merely to codify *Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988), which provided only that the State Elections Canvassing Commission may include in its certification county returns that were not in the proper form but were timely under § 102.111, and did not authorize the Secretary of State or the Commission to delay certification to a later date. This interpretation (or the simple interpretation that § 102.111 is a direction and § 102.112 is a warning) can make the provisions consistent without, as the Florida Supreme Court did, rendering the Legislature's direction in the "shall" provision of § 102.111 meaningless. Since all "shall" provisions are read to avoid absurd results not contemplated by the Legislature, the fact that this "shall" provision would not be enforced in the event of a hurricane does not undermine this interpretation. But the possibility of manual recounts cannot be deemed an event uncontemplated by the Legislature when it set the deadline in the same statute that created the manual recount provisions.

contrary interest in finality. *Palm Beach*, *supra*, at *4, 12-13; *Gore*, *supra*, at *8-9, 11-12,*16-18. In doing so, the Florida Supreme Court has ordered the inclusion of the Broward County manual recount in violation not only of the legislative deadline, but of this Court's remand vacating the Florida court's earlier decision until that court could explain how it could reach such a conclusion without circumscribing the legislative power or putting Florida's electoral votes at risk. Indeed, the Florida Supreme Court required the inclusion of manual recounts from Miami-Dade and Palm Beach County in contravention not only of the statutory deadline, but also of the deadline which that court itself had set in its earlier opinion. *Gore*, *supra*, at *14-18. Finally, the court required new manual recounts in all the other counties even though such manual recounts had never been requested by any party and plainly cannot be finished before December 12. *Id.* at *7-9, 17-18.

In short, the new rule the Florida Supreme Court now wishes to promulgate is not only that manual recounts must always be done in any close election, but that there can never be any deadline for completing such a manual recount. This is a complete reversal of the legislative directions for how elections should be conducted, and it clearly violates Article II of the United State Constitution. All this flows from the court's position that the top priority should not be what the Legislature directed but rather should be completing as broad a manual recount as possible on the dubious empirical and normative assumptions that this better ascertains the will of the voter and matters more than finality.

In its first opinion, the Florida court was quite plain in basing its position on its view of state constitutional law rather than a technical reading of the Legislature's statutory

directions.[7] Chastised by this Court for doing so, the Florida Supreme Court has tried to minimize direct references to the state constitution in its more recent opinion. But the court continued to incorporate that state constitutional principle

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7. *Palm Beach*, *supra*, at *15 ("*Because* the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the initial statutory date are limited . . . to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, *misses the constitutional mark. The constitution eschews punishment by proxy*"); *id.* at *11 ("To determine the circumstances under which the Secretary may lawfully ignore returns . . . it is *necessary* to examine . . . constitutional law at both the state and federal levels."); *id.* at 12 ("To the extent that the Legislature may enact laws regulating the electoral process, those laws are *valid only* if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage" guaranteed by the state constitution."); *id.* ("Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote . . . ."); *id.* at *13 ("Based on the foregoing [discussion of only state constitutional law], we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion."); *id.* ("To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding [state constitutional] law."); *id.* ("Technical statutory requirements must not be exalted over the substance of this right" of franchise under state constitutional law.); *id.* at *4 ("the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases"); *id.* ("the will of the people is the paramount consideration . . . to reach the result that reflects the will of the voters, whatever that might be [is our] fundamental principle"). Emphases added throughout.

by reference, repeatedly relying on a case that articulated an intent of the voter standard based on state constitutional law. *Gore*, *supra*, at *8-9, 11 (relying on *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975)). Moreover, the court below has continued to enforce the manual recounts included as a result of its vacated opinion without explaining, as this Court asked it to do on remand, how its requirement that those tardy manual recounts must be accepted could be based on anything other than state constitutional constraints. In any event, the Florida court's imposition of its conception of what best measures the will of the people is hardly rendered more palatable under Article II if that conception is based on these judges' preferred policy rather than on state constitutional law. The important defect is that this conception (whatever its source) deviates from the directions the Legislature itself plainly left in its statutes.[8]

The Florida Supreme Court's view that all other legislative directions should be subordinated to the court's view about the primacy of manual recounts also led it to several other deviations from the Legislature's carefully crafted scheme. Because the Secretary's opinion and interpretation conflicted with the court's absolutist preference for manual recounts, the Florida court did not follow the statutory provisions making her opinions and interpretations binding on county boards. *See supra.*

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8. At many points, the Florida Supreme Court cites statutory sections for its "intent of the voter" test. *Gore*, *supra*, at *9, 11. But here the court seems to conflate the statutory proposition — which was that, *if* a manual recount should be done and could be completed within statutory deadlines, it should be conducted pursuant to a clear intent of the voter standard — with the court's own entirely different proposition that a manual recount done under an intent of the voter standard is always required and preferable to a machine recount no matter the circumstances or deadlines.

The Florida Supreme Court also abandoned the requirement that a contest plaintiff prove substantial noncompliance with law: that is, that the plaintiff has proven, as FLA. STAT. § 102.168(3)(c) requires, the illegal rejection of what are legally votes, rather than merely proof of the legal rejection of what legally are non-votes. *See supra.* Thus, the Florida Supreme Court rejected any abuse of discretion review of the board's decision to conduct a manual recount, *Gore, supra*, at *6, even though that was plainly part of the statutory scheme and case law interpreting it prior to this election. *See supra.*[9] It also found actionable the entirely proper rejection of votes that were provided after the statutory deadline. The Florida Supreme Court's abandonment of the substantial noncompliance requirement for contests not only deviated from law before the election, but also deviated from that same court's unanimous decision last week in the butterfly ballot case, which rejected plaintiff's claims for failure to prove "substantial noncompliance." *Fladell v. Palm Beach County Canvassing Bd.*, 2000 WL 1763142, at *2 (Fla.)

In effectuating its preference for manual recounts, the Florida Supreme Court has also deviated in multiple ways from the statutory conditions for *how* manual recounts may be conducted. The Florida Supreme Court decision now requires that manual recounts be done just for ballots that the machines interpreted as not registering a vote rather than

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9. If the court meant that a county refusal to do a manual recount is always wrongful when the election is close, that decision plainly contraverts the statutory provisions limiting manual recounts and giving county boards discretion over whether to do them. *See supra.* If the court meant that a non-wrongful county decision could be found actionable in a contest action, then it contraverts the contest statute and the substantial noncompliance test.

for all ballots counted by these machines. *Gore*, *supra*, at *7. This contravenes the legislative direction in FLA. STAT. § 102.166(5)(c), which provides that if a manual recount because of machine error is done, it must be of "all ballots" counted by such machines. Moreover, the Florida Supreme Court ignored the problem that, if machines were misinterpreting ballots, that problem also applied to overvotes, *see Gore*, *supra*, at *20 n.26 (Wells, C.J., dissenting), and to what were otherwise registered as votes. For example, if a hanging chad equals a vote that converts a machine undervote into a legal vote, then it also equals a vote than can convert a single vote into a double vote that makes the ballot invalid. The only way to get a count that consistently applies the same standard for all ballots would thus be manually to count *every* ballot rather than just "undervotes," which is precisely what the Legislature directed.

The Florida Supreme Court has also ordered that manual recount figures must be included even though derived under standards that demonstrably differed between the counties that have already done manual recounts, each of which also differed from the prior practice of not counting chads unless two corners are perforated. *See supra.* The court also orders future counting to be done under standards that are permitted to vary across 64 more counties. These court orders deprive the process of the statutorily required uniformity and bar the Department of State from exercising its statutory duty to assure such uniformity. *See supra*. Such changing, vague, and varying standards also create, as discussed below, severe risks for Florida's electoral voters under 3 U.S.C. § 5 and the equal protection clause.

II. THE FLORIDA SUPREME COURT HAS JEOPARDIZED FLORIDA'S PARTICIPATION IN THE ELECTORAL COLLEGE.

The Florida Supreme Court has jeopardized Florida's participation in the Electoral College in disregard of this Court's prior admonition, clear legislative wishes, and the Florida Supreme Court's own prior decision.

Federal election law provides that a state's election results are not binding on Congress when it counts the electoral results unless all controversies regarding that election are resolved by December 12 and "pursuant to" pre-existing law. 3 U.S.C. § 5.

This Court has previously warned the Florida Supreme Court to take into account that "a legislative wish to take advantage of the 'safe harbor' [provided by 3 U.S.C. § 5] would counsel against any construction of the Election Code that *Congress* might deem to be a change in law." *Bush*, *supra*, at 6 (emphasis added). As this statement indicates, the question is not whether the majority of the Florida Supreme Court believes that its statutory construction constitutes a change in the law. The question is whether there is a reasonable risk that "Congress might deem" its statutory construction a change in law. Because any State Legislature would have a strong interest in assuring its electoral votes are counted by Congress, this seems to justify a strong canon that the construction of statutes governing Presidential elections must be interpreted to avoid arguable changes in law.

The analysis in Section I clearly establishes the existence of a reasonable risk that Congress might deem the Florida

Supreme Court to have altered pre-existing law.[10] Indeed, this risk has been heightened by the sharply divided 4-3 nature of the Florida opinion and the fact that the Florida court's own Chief Justice deems the opinion a clear departure from pre-existing Florida law. *See Gore*, *supra*, at *18 (Wells, C.J., dissenting) ("the majority's decision . . . has no foundation in the law of Florida as it existed on November 7, 2000"); *id.* at *25 (the majority opinion "not only changes a rule after November 7, 2000, but it also changes a rule this Court made on November 26, 2000.")

Finally, even if it did not involve such a clear departure from pre-existing law, the Florida Supreme Court majority opinion would vitiate Florida's safe harbor under 3 U.S.C. § 5 because it requires a manual recount that cannot fairly be completed and finally adjudicated before midnight December 11. This not only deviates from the Florida Legislature's wishes, but from the Florida Supreme Court's own prior opinion, which stated that manual recounts should not be counted if they would be "submitted so late that their inclusion will preclude Florida's voters from participating fully in the federal electoral process." *Palm Beach*, *supra*,

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10. Respondents will presumably reprise their argument that, as long as review by the Florida Supreme Court was provided for by enactments prior to the election, 3 U.S.C. § 5 cannot be violated. This contention fails to explain the "pursuant to" or "other methods" language of § 5, and is invalid for the other reasons explained in our prior amicus brief. In any event, even if all 3 U.S.C. § 5 did require was a prior regime for dispute resolution, that is emphatically *not* what U.S. CONST. ART. II, § 1, ¶ 2 requires. That constitutional clause requires that Electors be appointed in conformance with the directions of the State Legislature. A state supreme court that deviates from those directions thus violates the U.S. Constitution even if some form of judicial review in that court were provided by prior legislative enactments.

at *15. This led the Florida Supreme Court to set a firm deadline of November 26 for all manual recounts, which deadline the court expressly justified as necessary in order to assure completion of all contests before December 12. Yet now the Florida court has ordered further manual recounts (which of course might themselves be contested) in disregard of this weighty concern.

The Florida Supreme Court has regrettably assumed for itself the powers given to the Florida Legislature under the U.S. Constitution. Although the determination of the issues this raises is a political issue best left to the Florida Legislature and Congress, it is plain that today the only way to satisfy 3 U.S.C. § 5, and assure that Florida's electoral votes are counted in the electoral college, is for this Court to reverse the Florida Supreme Court and resolve the pending contest. It would be a travesty, after all Florida has been through these past few weeks, for the end result to be that all 6 million voters in Florida might be disenfranchised in the Electoral College.

III. THE DECISION OF THE SUPREME COURT OF FLORIDA RISKS THE REJECTION OF FLORIDA'S ELECTORS BY CONGRESS BECAUSE THE METHOD IT DECREED FOR THEIR SELECTION VIOLATES EQUAL PROTECTION.

The right to vote is a fundamental right. The disparate treatment of persons or groups of persons in respect to access to the vote, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), or in respect to the way in which their vote counts or is counted towards the end for which the election is conducted, *Reynolds v. Sims*, 379 U.S. 870 (1964), must meet

the strictest standard of constitutional review. These constitutional constraints apply to the methods by which a State selects Presidential electors. *Williams v. Rhodes*, 393 U.S. 23 (1968).

The decision of the Supreme Court of Florida, if allowed to stand, would set in motion a process that counted or rejected votes on an extremely wide range of standards — full perforation, various degrees of partial perforation, some degree of indentation or dimpling of the area intended to be perforated, counting only consistent dimpling, counting dimples if the voter voted for the candidates of the same party for other offices — all under the capacious and unconstraining rubric of the "intent of the voter." A scheme that assumes and explicitly countenances disparate treatment of this kind need not be shown to be carried out for some sinister or discriminatory purpose (as in *Yick Wo v. Hopkins*, 119 U.S. 536 (1886), or *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985)). It is sufficient that this intentionally disparate treatment is arbitrary and detrimental. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438 (1982) (Blackmun, J. concurring); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).[11]

Of course, this is especially true where a scheme is set up that unjustifiably discriminates between persons in respect to the enjoyment of a fundamental right. Imagine a scheme like the one ordered by the court in this case, but instituted explicitly and in so many words by the State Legislature:

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11. As we have pointed out, the legislative scheme scrupulously adheres to the principle of equality and uniformity in the standards for interpreting ballots during manual recounts. FLA. STAT. § 101.5609(8) ("standards shall ensure that ballots are counted in a uniform and consistent manner").

> In conducting a manual count of punch card ballots, the counters must determine the intent of the voter. The intent of the voter may (or may not) be discerned only if the perforation is complete, or may (or may not) be inferred from an indentation, however faintly discernible in the vicinity of the chad, or may (or may not) depend on the pattern of indentations or parties of the other candidates voted. The criteria for discerning the intent of the voter shall depend on the county in which the contest takes place — or the precinct, or the identity of the counter, or the time of day.

Such a scheme would manifestly violate equal protection. But this was precisely the scheme the court below knowingly instituted in this case. And it is no justification that the court found it difficult or embarrassing to arrive at the specification necessary to render that scheme uniform.

Petitioners phrase their complaint in this regard in terms of a violation of due process as well. In cases such as this, where the law imposes arbitrary distinctions there is not a great difference between that rubric and that of equal protection. Thus *Logan v. Zimmerman Brush*, *supra*, in which the administration of a scheme led to severely disparate treatment for no good reason, was analyzed by four Justices in terms both of equal protection and due process. A similar point holds for the fundamental rights of speech and assembly. Although government may sometimes condition those rights on the obtaining of a license or permission, the grant of authority to the relevant officials may not be so vague and devoid of guidance as to invite arbitrary or discriminatory treatment. "A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must

contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 131 (1992) (internal quotations omitted). No less should be demanded here where officials are charged with determining whether to count votes and which votes to count. Here too, a fundamental right is at stake and there must be "narrow, objective and definite standards" governing the exercise of official discretion. The process the court below set in motion granted the officials administering it a discretion that was broad, subjective and indefinite. If these officials had been charged with issuing parade permits, this Court would not tolerate such standardless discretion. Nor should it tolerate it here, where it affects the right to vote.

The decision below creates a system for counting Presidential votes so replete with arbitrary and unjustifiable distinctions that it violates Equal Protection. Even if a single slate of Presidential electors were appointed pursuant to such a scheme and voted in the Electoral College, there is a significant possibility that such a slate would subsequently be invalidated by the courts, leaving Florida unrepresented in the Electoral College. Or even if the courts did not step in, Florida risks having any electors so designated rejected by the Congress. Under 3 U.S.C. § 15, Congress will only count the votes of electors that have been "regularly given." It is axiomatic that votes given by electors chosen in violation of the Constitution have not been "regularly given," and thus might never be counted.

CONCLUSION

This Court should reverse the decision of the Florida Supreme Court and provide a final determination of contests in this election by midnight December 11, which will assure Florida's Electors are represented in the Electoral College.

Respectfully submitted,

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